No. 76-221

In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK NATHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

ROBERT E. LINDSAY,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-221

JACK NATHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

There is no opinion of the district court. The opinion of the court of appeals (Pet. App. A) is reported at 536 F. 2d 988.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1976, and petitioner's petition for rehearing with suggestion for rehearing *en banc* was denied on August 6, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on August 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to instruct the jury that the proceeds of certain checks cashed by petitioner were paid out in kickbacks and therefore not includable in petitioner's income.

2. Whether the trial court improperly precluded petitioner from playing a tape recording, during cross-examination of a government witness, of a conversation between petitioner and the witness.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of willful evasion of income tax for the years 1967 through 1970, in violation of 26 U.S.C. 7201. The court sentenced petitioner to concurrent terms of nine months' imprisonment on each count and a fine of $10,000 on each count. The court of appeals affirmed (Pet. App. A).

The evidence at trial established that during the years in issue petitioner owned and operated a bill collection agency, Nathan, Nathan & Nathan, Ltd., which collected delinquent customer accounts owed to hotels (Tr. 28-29, 169, 377).[1] The collection receipts obtained by petitioner's agency were deposited in its bank account, and, after deducting a fee of approximately 35 percent, the agency remitted the balance to the client by a check carried on the agency's books as a "refund" (Pet. App. 2a). The gross receipts reported on the agency's tax returns for the years 1967 through 1970 were computed by subtracting the "refunds" to the hotels from the agency's gross collections (Tr. 197-199).

The proof established that petitioner employed two devices to understate the income of the agency. First, checks allegedly drawn to clients were carried on the agency's books as "refunds" and were subtracted from gross collections in computing gross receipts each year, even though

[1]"Tr." refers to the transcript of trial proceedings.

the checks had not been cashed three or more years after they were allegedly mailed to the clients (Tr. 447-448, 450-457; see also Tr. 32, 198-200, 220, 235). In 1967 and 1968, the total amount of these checks exceeded $26,000 (Tr. 475-476).[2] Second, petitioner drew checks to client hotels (St. Moritz, New York Hilton, Statler Hilton and Waldorf-Astoria) for which he received cash from the hotels. However, these checks were treated as "refunds" on the agency's books and deducted from gross collections (Tr. 105-106, 113-114, 151-153, 201, 244, 457, 548; Govt. Exs. 31-145, 336). For the period 1967 through 1970, petitioner cashed more than $36,000 in checks with his client hotels and treated them as "refunds" on the agency's books (Tr. 469-471, 475-476).[3]

In January 1966 petitioner hired Allan Edwards, a certified public accountant, to prepare his 1965 personal and corporate tax returns and to maintain the books of his

[2]The agency did not charge any of these outstanding checks back to income until 1971 (Tr. 220). In 1969, $11,515.74 of outstanding checks were treated as "refunds" on the company's books; in 1970, $5,958.54 of such checks were treated as "refunds" on the books (Tr. 456). Neither sum, however, was included in the computation of the understatement of income (Tr. 454). The 1969 and 1970 corporate returns were not filed until 1971 (see Tr. 228). These returns contained adjustments adding certain outstanding checks to income (*i.e.*, outstanding checks for 1963 and 1964 were deducted on the 1969 return and the 1965 outstanding checks were deducted on the 1970 return) (Tr. 234).

[3]In 1967 and 1968, the agency filed tax returns as a Subchapter S corporation. As the corporation's sole shareholder, petitioner was taxed on the corporation's net income. The understatement of the corporation's gross receipts and profits therefore resulted in an understatement of petitioner's taxable income. In 1969 and 1970, the agency filed tax returns as a regular corporation. Hence, the understatement of the corporation's income resulted in a corporate tax deficiency. However, petitioner's failure to report the cashed checks as dividend income resulted in an understatement of his personal income tax liability (see Tr. 472-475).

business (Tr. 21-29). The next month Edwards notified petitioner that he could not prepare the tax returns until certain entries in the corporate books, which reflected large amounts as "refunds" paid to hotels and which, in fact, reflected stale outstanding checks, were reversed (Tr. 32-34, 76-78). When petitioner failed to respond to Edwards' inquiry concerning these adjustments, Edwards refused to prepare and file the tax returns and obtained an extension of time for filing of the returns (Tr. 41-46). Petitioner then discharged Edwards and retained another accountant, Sanford Katz (Tr. 47, 171-172). Katz testified that in 1966 or 1967 he mentioned the outstanding checks to petitioner, and petitioner told him that he had instructed his bank to pay the checks if they were ever presented for payment (Tr. 213-214, 292, 389). By 1971, checks totalling approximately $50,000 were outstanding, dating back to 1963 (Tr. 447-456; Govt. Exs. 338, 441-444).

The checks that petitioner made out to the client hotels and cashed resembled genuine "refund" checks (Tr. 279-280; Pet. App. 4a). Both of petitioner's accountants had been led to believe that these checks were "refund" checks to clients, and petitioner never told them that he was obtaining cash for the checks at the client hotels, nor did he make any other elucidating entries on the stubs or face of the checks, which he generally drew himself (Tr. 222-224; Pet. App. 4a).

ARGUMENT

1. a. Petitioner contends (Pet. 6-7) that the trial court erred in refusing to instruct the jury that if it found that the proceeds from the checks cashed at the client hotels were paid out as kickbacks to assure a continued flow of business from the clients, then the jury could not consider the proceeds from such checks as petitioner's income.

But petitioner did not testify as to the payment of such kickbacks nor did he present any witnesses in his behalf. The only evidence of kickbacks came from the credit manager of the Waldorf-Astoria Hotel, Joseph Mazzurco, who testified that petitioner gave him $40 to $100 in cash approximately every two months (Tr. 153-156).[4] However, as the court of appeals noted (Pet. App. 5a), there was absolutely no evidence that these cash kickbacks came from the proceeds of the checks cashed at the client hotels. There was accordingly no basis upon which the jury could find that the proceeds of the checks were paid out as kickbacks.

Moreover, even assuming that the credit manager at each of the four hotels received the maximum cash kickback that Mazzurco testified he received ($600 per year), this would amount to only $2,400 per year and would account for less than seven percent of the cash proceeds received by petitioner from the checks.[5] There was no evidence whatsoever that petitioner paid out the remaining

---

[4]Petitioner also points (Pet. 7, n. 3) to the testimony of Leonard Groppe, credit manager of the St. Moritz Hotel. But Groppe did not testify to receiving any cash from petitioner, but merely stated that he received checks from petitioner on three or four occasions at Christmas (Tr. 112). Lawrence Carey, the credit manager of the New York Hilton Hotel, was not asked whether he had received cash kickbacks from petitioner.

[5]The number of checks and the amounts for which they were cashed in each year were as follows (Govt. Exs. 31-145, 336):

Year	*Checks*	*Total Amount*
1967	33	$9,485
1968	29	$9,480
1969	32	$10,485
1970	18	$6,670

proceeds from the checks as kickbacks to assure a continued flow of business. In short, the record was bare of any evidence in support of petitioner's proposed instruction. Under these circumstances, the trial court properly refused to charge the jury concerning these kickbacks. See *United States* v. *Achilli*, 234 F. 2d 797, 808 (C.A. 7), affirmed, 353 U.S. 373.

b. There is likewise no merit to petitioner's contention (Pet. 6-7) that the standard applied by the court of appeals in judging when the jury must be instructed as to a defense conflicts with the standard applied by other courts of appeals. In support of this argument, petitioner cites language in the court of appeals' opinion that the defense "was not sufficiently raised in the evidence" to require an instruction (Pet. App. 5a), and contrasts this statement with opinions of other courts of appeals that the jury should be instructed on a theory of defense "when the theory is supported by any evidence" (*United States* v. *Mathis*, 535 F. 2d 1303, 1305 (C.A.D.C.)) and that a theory of defense instruction may be denied only when the "record is wholly devoid of any such evidence" (*United States* v. *Achilli*, *supra*, 234 F. 2d at 808). While the court below stated the kickback defense "was not sufficiently raised in the evidence," the court further stated that "[n]o nexus between these payments and the proceeds of the challenged checks appears in the record" (Pet. App. 5a) and that "[t]here is not the slightest hint in the record as to a legitimate business usage for the remaining bulk of the cash proceeds of these checks" (*ibid.*). These latter two statements demonstrate that the court simply held that there was absolutely no evidence in the record which supported the kickback defense.[6] There is accord-

[6]Petitioner asserts that the court of appeals "ignored Mazzurco's testimony that what had been done for him represented a 'practice' or 'custom' in the trade" (Pet. 5). But Mazzurco did not testify

ingly no conflict with *Mathis* or *Achilli*; on these facts, courts applying the formulation of those cases would have reached the same result.

2. Petitioner also contends (Pet. 7-8) that the trial court erroneously precluded him from playing a tape recording, during his cross-examination of a government witness, of a conversation between petitioner and the witness. On cross-examination, Groppe, the credit manager of the St. Moritz, testified that in 1974 he told an agent of the Internal Revenue Service that certain checks from petitioner's agency payable to him, which the agent exhibited to him, were for collection work he had performed for petitioner (Tr. 122-126). Groppe denied that his statement to the agent was false (Tr. 126) and denied that he ever told petitioner that his statement was false (Tr. 127). Petitioner then sought to impeach Groppe with a tape recording of what purported to be a conversation between petitioner and Groppe in which Groppe acknowledged that he had never done any collection work for petitioner and that he had lied to the agent (Tr. 129).

At petitioner's suggestion, the court excused the jury (Tr. 131-132) and listened to the tape. After it became clear that petitioner had several conversations on the tape and could not locate the beginning of the conversation

that the payment of cash kickbacks was a practice or custom in the trade. Rather, he stated that it was a practice "in [his] business as the credit manager when [he] dealt with these people that they gave [him] gratuities from time to time" (Tr. 161-162). At all events, the court of appeals correctly held that the trial court properly refused the requested instruction, "[e]ven assuming that each of the credit managers at these hotels were receiving cash 'gratuities' of $200 to $500 per year" (the amount testified to by Mazzurco) from petitioner (Pet. App. 5a).

that he wanted to use on cross-examination,[7] the trial

---

[7]The following colloquy took place during the playing of the tape for the court (Tr. 129-130, 132-135):

THE COURT: What's the date of the tape?

MR. BENDER: I have to check it. I have to find out.

THE COURT: Find out.

(Pause)

MR. BENDER: 5/21/74.

THE COURT: And who initiated the call?

MR. BENDER: I think he said that he called.

THE COURT: But I don't know if that's the one that you have the tape on.

MR. BENDER: I think he said he did.

THE COURT: You must know who initiated the call.

MR. BENDER: I wish I did. I can find out.

(Pause)

MR. BENDER: Mr. Nathan says that the witness called him.

* * * * *

THE COURT: All right, Mr. Bender, put on the tape.

MR. BENDER: Could I have Mr. Nathan take over? He has got the machine.

THE COURT: Yes.

(Tape played.)

* * * * *

MR. WOHL: Can we hear the conversation from the beginning?

THE COURT: He is going to do that now.

THE DEFENDANT: Your Honor, I have two other tapes. I think they all – I had to tape these things because I knew they were making these people perjure themselves.

THE COURT: Mr. Nathan, you sort of started it in the middle. Is there a beginning to this tape?

THE DEFENDANT: I believe so.

THE COURT: Let's hear how that starts.

(Tape played.)

court ruled that the tape recording could not be used at that time, stating that "if during the defendant's case you

---

* * * * *

MR. BENDER: We want it in. We think it should go in and let the jury decide who is pressuring who.

THE COURT: What do you say?

MR. WOHL: I would like to hear the beginning of the conversation first. It is not a complete conversation and I am curious about that.

* * * * *

THE COURT: We are going to waste a lot of time on this, but it looks as though he didn't start in the beginning. Let's find that and put that on. See if you can find that.

MR. BENDER: Judge, that statement that you made bothers me.

THE COURT: What?

MR. BENDER: Do you feel that he pressured this witness into saying that he lied?

* * * * *

THE COURT: I am ruling if you insist on it, if we get the beginning of the conversation you can put it in and on the redirect he can bring out all kinds of things if he wants to, but okay.

* * * * *

THE COURT: Have we got the beginning of that conversation?

THE DEFENDANT: I believe so. I have trouble with my eye from that operation, so you will have to forgive me.

(Tape played.)

MR. WOHL: Excuse me, usually in these tape recordings there is a beginning.

THE COURT: That's what I am looking for. Where is the beginning?

THE DEFENDANT: Excuse me, your Honor. I believe at the end of this we will go open to the other. I believe so. I haven't played these things—

get this straightened out, you find out what conversations are what and who originated them and you want to put them on in the defense case, that will be all right, and if it is necessary to recall the witness we can do that" (Tr. 135).[8] As the court of appeals correctly recognized (Pet. App. 6a), it was "plainly within the trial court's discretion to avoid delays in the trial by requiring counsel who does not have his evidentiary material in workable order to proceed with examination of a witness rather than to bog down the trial by a lengthy, awkard in-court attempt to straighten matters out * * *." Indeed, here, the court only temporarily excluded the tape recording,[9] and petitioner never reoffered the tape. Thus, petitioner cannot complain of the exclusion of the tape, since he had an open opportunity to reoffer the tape once it was properly prepared for use. See *United States* v. *Badalamente*, 507 F. 2d 12, 22 (C.A. 2), certiorari denied, 421 U.S. 911.

THE COURT: You think this is a different conversation?

THE DEFENDANT: Yes, sir.

(Tape played.)

THE COURT: I am trying to get the beginning of the one that you had before. You don't know?

THE DEFENDANT: No, I don't know.

[8]It is clear that the court was not limiting petitioner to presentation of this tape during the defense case, but was perfectly willing to allow it to be presented as soon as it was properly prepared for presentation (see Tr. 134.)

[9]*United States* v. *Segal*, 534 F. 2d 578 (C.A. 3), relied upon by petitioner (Pet. 7-8), does not conflict with the decision below. There, the trial court totally precluded use of a tape on cross-examination on the ground that the tape had not been played on direct examination and that cross-examination could not exceed the scope of the direct examination.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

ROBERT E. LINDSAY,
Attorney.

OCTOBER 1976.